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MICHAEL RODAK, JR., CLE

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

GERALD REYNOLDS, d/b/a
BEN'S AUTO SALES,

Petitioner,

-vs-

ELLA YAZZIE, ALBERT SLIVERS,
MARY KEYONNIE, ALICE MARY BEGAY,
and ADELLA T. BENALLY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

Whether the Court of Appeals for the Tenth Circuit erred in ruling that generalized credit-related costs incurred by a creditor in the extension of credit payable in more than four installments *ipso facto* become "finance charges" imposed on the debtor and therefore subject to disclosure under the Truth-in-Lending Act, and further,

whether the Tenth Circuit Court of Appeals thereby nullified the logic underlying the Four Installment Rule, 15 U.S.C. Section 1602(f) and this Court's decisions in *Mourning v. Family Publications Service, Inc.*, 411 US 356 (1973) and *Ford Motor Credit Co., v. Milhollin*, ____ U.S.____, 100 S.Ct. 790 (February 20, 1980), insofar as these decisions require that for costs of credit to be termed "finance charges," they must be specific, assessable, readily determinable sums.

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and ADELLA T. BENALLY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Gerald Reynolds, Petitioner, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on June 12, 1980.

OPINIONS BELOW

Tenth Circuit Court of Appeals: The Opinion of the Court of Appeals for the Tenth Circuit is not yet reported and is set forth herein as Appendix A, pp. 1-22.

District Court for the District of New Mexico: The unpublished Memorandum Opinion and Order of the District Court, Honorable Judge Edwin L. Mechem, is set forth herein as Appendix B, pp. 23-34.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 United States Code Section 1254(1) to review a decision of the Court of Appeals for the Third Circuit entered June 12, 1980.

QUESTIONS PRESENTED

Whether the Court of Appeals for the Tenth Circuit erred in ruling that generalized credit-related costs incurred by a creditor in the extension of credit payable in more than four installments ipso facto become

"finance charges" subject to disclosure under the Truth in Lending Act, and further,

whether the Tenth Circuit Court of Appeals thereby nullified the logic underlying the Four Installment Rule, 15 U.S.C. Section 1602(f) and this Court's decisions in Mourning v. Family Publications Service, Inc., 411 US 356 (1973) and Ford Motor Credit Co., v. Milhollin, _____U.S._____, 100 S.Ct. 790 (February 20, 1980), insofar as these decisions require that for costs of credit to be termed "finance charges," they must be specific, assessable, readily determinable sums.

PROVISIONS INVOLVED

Statutes:

United States Code Title 15, Section 1602(f):

> The term "creditor" refers only to creditors who regularly extend, or arrange for the extension of, credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, whether in connection with loans, sales of property or services, or otherwise. For the purposes of the requirements imposed under Chapter 4 (15 USCS §§ 1666 et seq.)

and sections 127(a)(6), 127(a)(7), 127(a)(8), 127(b)(1), 127(b)(2), 127(b)(3), 127(b)(9), and 127(b)(11) of Chapter 2 of this Title (15 USCS § 1637(a)(6-8), (b)(1-3), (9), (11), the term "creditor"shall also include card issuers whether or not the amount due is payable by agreement in more than four installments or the payment of a finance charge is or may be required, and the Board shall, by regulation, apply these requirements to such card issuers, to the extent appropriate, even though the requirements are by their terms applicable only to creditors offering open end credit plans. The provisions of this title (15 USCS §§ 1601 et seq.) apply to any such creditor, irrespective of his or its status as a natural person or any type of organization.

United States Code Title 15, Section 1605(a):

Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person wo whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit, including any of the following types of charges which are applicable:

(1) Interest, time price differential, and any amount payable under a point, discount, or other system of additional charges.

(2) Service or carrying charge.

(3) Loan fee, finder's fee, or similar charge.

(4) Fee for an investigation or credit report.

(5) Premium or other charge for any guarantee or insurance protecting the creditor against the obligor's default or other credit loss.

United States Code Title 15, Section 1631:

(a) Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended, the information required under this chapter (15 USCS §§ 1631 et seq.) or chapter 4 (15 USCS §§ 1666 et seq.).

(b) If there is more than one obligor, a creditor need not furnish a statement of information required under this chapter (15 USCS §§ 1631 et seq.) or chapter 4 (15 USCS §§ 1666 et seq.) to more than one of them.

Regulations:

Regulation 12 C.F.R. Section 226.4(a):

(a) General rule. Except as otherwise provided in this section, the amount of the finance charge in connection with any transaction shall be determined as the sum of all charges, payable directly or indirectly by the customer, and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit, whether paid or payable by the customer, the seller, or any other person on behalf of the customer to the creditor or to a third party, including any of the following types of charges:

(1) Interest, time price differential, and any amount payable under a discount or other system of additional charges.

(2) Service, transaction, activity, or carrying charge.

(3) Loan fee, points, finder's fee, or similar charge.

(4) Fee for an appraisal, investigation, or credit report.

(5) Charges or premiums for credit life, accident, health, or loss of income insurance, written in connection with any credit transaction unless

(i) The insurance coverage is not required by the creditor and this fact is clearly and conspicuously disclosed in writing to the customer; and

(ii) Any customer desiring such insurance coverage gives specific dated and separately signed affirmative written indication of such desire after receiving written disclosure to him of the cost of such insurance.

(6) Charges or premiums for insurance, written in connection with any credit transaction, against loss of or damage to property or against liability arising out of the ownership or use of property, unless a clear, conspicuous, and specific statement in writing is furnished by the creditor to the customer setting forth the cost of the insurance if obtained from or through the creditor and stating that the customer may choose the person through which the insurance is to be obtained.

(7) Premium or other charge for any other guarantee or insurance protecting the creditor against the customer's default or other credit loss.

(8) Any charge imposed by a creditor upon another creditor for purchasing or accepting an obligation of a customer if the customer is required to pay any part of that charge in cash, as an addition to the obligation, or as a deduction from the proceeds of the obligation.

(Footnotes omitted)

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked pursuant to Title 15, United States Code, Section 1640(e) and Title 28, United States Code, Section 1337, Respondents having alleged violations of the Truth in Lending Act, Title 15, United States Code, Sections 1601, et seq.

Petitioner maintains a used car sales lot at Gallup, New Mexico, near the Navajo Reservation. He sells approximately ninety-eight percent of his automobiles through the use of retail installment sales contracts calling for payment in more than four installments. He does not charge buyers interest, service charges, credit report fees, or any other fees over and above the cash price disclosed in his contracts. Neither does he give customers a discount for cash payment or advance payment. None of his contracts are sold to banks or financial institutions at a discount. Petitioner's

contracts disclose the "finance charge" and "annual percentage rate" as "zero."

Petitioner does incur costs arising from his extensions of credit, such as maintaining payment records, paying fees to salesmen for collecting delinquent payments and repossessing automobiles, providing vehicles, gasoline, and a tow bar for use in making collections and repossessions, and losses due to unpaid accounts. There is a high incidence of delinquency in payments among Petitioner's customers, usually requiring at least one collection call by Petitioner on every account.

Respondents purchased automobiles from Petitioner and executed Petitioner's standard form retail installment sales contract which contained the "zero" disclosure of finance charge and annual percentage rate. The form of contract also included the phrase "Buyer . . . having been

quoted both a time sale price and a lesser cash price hereby purchases from Seller on a time price basis. . .the following property. . . ." However, none of the Respondents was quoted more than one price for the vehicle he or she purchased, and the price quoted was shown in each contract as both the "cash price" and the "deferred payment price."

On September 19, 1977, Respondents sued for statutory damages, costs, and attorney's fees alleging Petitioner had violated provisions of the Truth in Lending Act. After discovery, Respondents filed a motion for summary judgment on two issues:

(1) That Petitioner had actually imposed a finance charge in his transactions with Respondent and had violated the Truth in Lending Act by failing to disclose it; and

(2) That the reference to a non-existent cash-price, time-price differential

constituted "optional language stated so as to contradict or obscure" the required disclosures thereby violating 12 C.F.R. Section 226.6(c).

Petitioner filed a cross motion for judgment on these issues, and the parties submitted a statement of uncontested facts. The District Court in an unpublished opinion (Appendix B, pp. 23-34) denied Respondent's motion and granted Petitioner's cross motion, holding that Petitioner's costs incurred in extending credit were only part of his regular costs of doing business and that they did not arise to the level of "finance charge" under the Truth in Lending Act (Appendix B, page 33).

On appeal by Respondents, the Tenth Circuit Court of Appeals reversed and remanded in an opinion and separate judgment filed June 12, 1980 (Appendix A, pp. 1-22 and Appendix C, pp. 35 and 36, respectively).

The issue as defined by the Court of Appeals was ". . .whether this single-price sales approach was intended to and did conceal the cost of credit so as to circumvent the Truth in Lending Act, 15 U.S.C. § 1601, et seq., and 12 C.F.R. Section 226.4" (Appendix A, p. 6). The Court reviewed the facts and several Truth in Lending Act cases and concluded there were facts in the record which established the existence of substantial expenditures made in servicing delinquent installment contracts, and that there was present a factual issue as to whether Reynolds was attempting to circumvent the Truth in Lending Act (Appendix A, pp. 21 and 22).

REASONS FOR ALLOWING THE WRIT

Petitioner respectfully submits that, for the reasons which follow, this Court's response to the issues raised herein will have far-reaching consequences in the

interpretation of a crucial component of the Truth in Lending Act affecting innumerable commercial transactions.

> 1) If the definition of the term "finance charge" implicitly used by the Tenth Circuit is allowed to stand, the action of the Federal Reserve Board and Congress in promulgating and enacting the "Four Installment Rule" will be rendered a nullity.

The Truth in Lending Act[1] compels disclosure by "creditors" of finance charges imposed in credit transactions, with the charges to be expressed both in a dollar amount and as an annual percentage rate (APR).[2] Under the Act, the term "creditor" refers ". . .only to creditors who regularly extend, or arrange for the extension of, credit which is payable by

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1. 15 U.S.C. 1601, et seq.

2. The disclosure requirement the items required to be disclosed for transactions such as those which are the subject of this case are set out at 15 U.S.C. 1638 and at 12 C.F.R. Section 226.6.

agreement in more than four installments or for which the payment of a finance charge is or may be required. . ." (emphasis added).[3] The "more than four installment" is referred to as the "Four Installment Rule," and it forms part of a clearly disjunctive definition of "creditor" for purposes of determining the scope of the Truth in Lending Act. There are those creditors who impose finance charges, and there are those creditors who do not impose finance charges but who permit repayment in more than four installments. These latter creditors must make the required disclosures though, of course, the "finance charge" and "APR" items will read "ZERO."[4]

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3. 15 U.S.C. 1602(f).

4. See, e.g., the discussion of this necessary result in Clark & Fonseca, Handling Consumer Credit Cases, Section 41(d) (Cum. Supp., 1979).

Petitioner respectfully submits that he comes within the ambit of the Truth in Lending Act solely by reason of his extension of credit repayable in more than four installments and not by reason of his imposition of any finance charges.

The two-part definition of "creditor" has been in existence since regulations applying the Truth in Lending Act were first set forth by the Federal Reserve Board.[5] The original rule created the two-part definition by use of the disjunctive language "either. . .or" as shown below:

> "Consumer Credit" is: Credit offered or extended to a natural person, in which the. . .property . . .which is the subject of the transaction is primarily for personal, family, household, or agricultural purposes and for which either a finance charge is or may be imposed or which pursuant to agreement, is or may be payable in more than four installments. (Emphasis added) 12 C.F.R. Section 226.2(k) (1975)

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5. See § 226.2(k), 34 Fed. Reg. 2003 (1969).

This Court determined that the Federal Reserve Board's promulgation of the rule was within its delegated power in Mourning v. Family Publications Service, 411 US 356 (1973). In the course of that opinion, this Court set out the rationale behind the two-part phrasing of the definition of "consumer credit":

> The rule was intended as a prophylactic measure; it does not presume that all creditors who are within its ambit assess finance charges, but, rather, imposes a disclosure requirement on all members of a defined class in order to discourage evasion by a substantial portion of that class. (Emphasis added) 411 US at 377.

Congress in 1974 amended the Truth in Lending Act to give the Four Installment Rule statutory strength, preserving the disjunctive phrasing in its definition of "creditor."[6] In that same Act, Congress also created 15 U.S.C. Section 1665, which provides that:

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6. P.L. 93-495, Title III, Section 303, amending 15 U.S.C. 1602(f).

> (a)ny advertisement to aid, promote, or assist directly or indirectly the extension of consumer credit repayable in more than four installments shall, unless a finance charge is imposed, clearly and conspicuously state, in accordance with the regulations of the Board: "THE COST OF CREDIT IS INCLUDED IN THE PRICE QUOTED FOR THE GOODS AND SERVICES." (Emphasis added) P.L. 93-495, Title IV, Section 401(a).

There has thus been a clear recognition by the Federal Reserve Board, this Court, and Congress that there are transactions involving extension of credit payable in more than four installments but which will not involve assessment of a finance charge.

Respondents refuse to admit of this possibility, contending that all costs a creditor would not incur but for the extension of credit automatically become finance charges which must be disclosed. The Tenth Circuit apparently acquiesced in this all-encompassing definition of finance charges. Petitioner respectfully submits that this line of reasoning is erroneous

because it completely destroys the rationale for the Four Installment Rule. That portion of the definition of "creditor" would be unnecessary, for those creditors would be included within the class of creditors actually imposing finance charges, whether they knew it or not.

Every extension of credit involves certain "costs" for the creditor. At a minimum, loss of use of the money for the period of deferral of payment will always be present. If Respondents' argument, that all credit-related costs ipso facto become "finance charges" were followed to its logical conclusion, there could never be a more-than-four-installment transaction which did not involve imposition of a finance charge. The Four Installment Rule would be rendered meaningless. The Tenth Circuit, in ignoring the distinction, failed to perceive the intent of Congress and the Federal Reserve Board in their adoption of the Four Installment Rule.

2) The Tenth Circuit's interpretation of the definition of "finance charge" under the Truth in Lending Act is in conflict with the applicable decisions of this Court and other federal courts considering the term.

"Finance charge" as that term is used in the Truth in Lending Act is a term of art which in no way was intended to include every conceivable cost associated with deferral of payment.

It is a matter of stipulated fact in the record that Petitioner incurs expenses as a result of his practice of selling on credit. But Petitioner contends that those expenses are fluctuating, not fixed; that they are unknown and unknowable in advance; and that they are therefore incapable of being ascertained and disclosed for any given transaction. For these reasons, they are more properly characterized as

generalized costs of doing business.[7]

To arise to the level of "finance charge," a cost incident to the extension of credit must be (a) passed on to the debtor, or capable of being so passed on; and (b) a fixed and definite amount. This Court in Ford Motor Credit Co. v. Milhollin, ____ U.S. ____, 100 S.Ct. 790(1980) construed the word "charge" as used in the phrase "default, delinquency, or similar charg(e)" in the Truth in Lending Act.[8] It was noted that "A 'default, delinquency, or similar charg(e)' . . . self-evidently refers to a specific assessable sum."[9] (Emphasis added) Likewise, the term

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7. Costs mentioned in the Tenth Circuit Opinion include the furnishing of an automobile to salesmen for the purpose of making collections or repossessions; the use of a towing bar; the payment of a flat fee to the collector (salesman) for each delinquent payment collected; the keeping of books; the giving of receipts; and losses due to unpaid accounts. (Court of Appeals Opinion, Appendix A, pp. 4-5, 7-8, 11-12)

8. This phrase occurs at 15 U.S.C. Sections 1638(a)(9), 1639(a)(7), and 12 C.F.R. Section 226.8(b)(4).

9. 100 S.Ct. at 795.

"finance charge" must also refer to a "specific assessable sum" which is capable of being passed on to the debtor incident to the extension of credit. It does not refer to mere generalized costs of doing business such as those incurred by Petitioner.

The Tenth Circuit overlooked this distinction between "costs incurred" and "charges imposed" in ruling that there was a triable issue as to whether Petitioner was assessing hidden finance charges. The Court's misapprehension is found in its statement that "In other words, the Defendant (Petitioner) was required to disclose any sums of money which stemmed from the credit transaction." (Appendix A, page 11) The "sums of money" the Tenth Circuit refers to, though, are not the "specific assessable sum(s)" described by this Court in the Ford Motor Credit Co. case, supra. They are at

best generalized costs of doing business, incapable of ascertainment.

Other federal courts considering this issue have held that fixed sums capable of being ascertained with certainty are what were intended to be disclosed as finance charges. The opinion of the Tenth Circuit relied on the case of Kriger v. European Health Spa, Inc. of Milwaukee, Wis., 363 F. Supp. 334 (E.D.Wis. 1973) for its holding that the record justified a trial on the issue of whether Petitioner was concealing finance charges (Appendix A, page 14). But that reliance was misplaced, as Kriger and the cases cited therein[10] are distinguishable from this case. In Kriger and the other cases, the creditors all regularly sold their installment sales contract to financing

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10. Strompolos v. Premium Readers Service, 326 F. Supp. 1100 (N.D.Ill. 1971), Joseph v. Norman's Health Club, Inc., 336 F. Supp. 307 (E.D.Mo. 1971), and Garza v. Chicago Health Clubs, Inc., 347 F. Supp. 955 (N.D.Ill. 1972).

institutions at a discount, unlike Petitioner who does not sell his contracts. The discounts those creditors had to sustain were known to them at the time they contracted with the debtors, and they were properly held to be finance charges subject to disclosure.

The Tenth Circuit neglected to mention the pertinent case of Manzina v. Publisher's Guild, Inc., 386 F. Supp. 241 (S.D.N.Y. 1974). That Court clearly recognized the distinction between "costs" and "charges":

> The cost of extending credit, however, is but one of the Guild's costs of doing business, and is not reasonably ascertainable since Defendant does not discount or assign its credit transactions to third parties. Plaintiffs claim, in essence, that all of the Guild's costs of doing business are converted into a finance charge which is included in "cash price"; "costs incurred" and "charges imposed," however, simply cannot reasonably be presumed synonymous as Plaintiffs would have it. 386 F. Supp. at 243. (Emphasis added)

The Tenth Circuit Opinion, it is submitted, also overlooks the holding of this Court in the Mourning v. Family

Publications Service, Inc. case, supra, that "(the Four Installment Rule) does not presume that all creditors who are within its ambit assess finance charges . . ." The reasoning of the Tenth Circuit in the case below necessarily calls for just such a presumption: If there are costs incurred incident to extension of credit (and there always will be at least the loss of use of the money), then some debtor must be bearing the burden in the form of a finance charge.

The opinion sought to be reviewed is also at odds with the observation in the Mourning case, supra, that "even as to sales in which it was impossible to determine what, if any, portion of the price recompensed the creditor for deferring payment, the regulation (the Four Installment Rule) at least required that the consumer be provided with some information which would

enable him to make an informed economic choice.[11] The Tenth Circuit's Opinion does not consider the possibility that the credit-related costs incurred by a seller might be incapable of determination.

CONCLUSION

For the reasons stated above, this Court is presented with an opportunity to correct a substantial deviation by the Tenth Circuit from the logic underlying the previous Truth in Lending Act decisions of the Supreme Court. The implications flowing from the Tenth Circuit's opinion, if allowed to stand, will be of serious consequence to countless commercial transactions. The Supreme Court's reimforcement of the bases for its previous Truth in Lending Act decisions will strengthen the salutary purposes of that Act.

WHEREFORE, Petitioner respectfully

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11. 411 US at 369.

prays that this honorable Court grant this Petition and issue its Writ of Certiorari in the above cause to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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A P P E N D I X

APPENDIX A

UNITED STATES COURT OF APPEALS
For The Tenth Circuit

No. 78-2012

ELLA YAZZIE, et al.,

Plaintiffs- Appellants,

-vs-

GERALD REYNOLDS, d/b/a
BEN'S AUTO SALES,

Defendant-Appellee.

Appeal From The United States District Court For The District Of New Mexico
(D.C. No. CIV 77-582)

Richard H. Levin
Window Rock, Arizona
For Plaintiffs-Appellee

Richard B. Addis
Albuquerque, New Mexico
For Defendant-Appellee

Before Seth
Chief Judge
Breitenstein and Doyle
Circuit Judges

OPINION

(Filed June 12, 1980)

Doyle, Circuit Judge

In this federal Truth-in-Lending Act case, 15 U.S.C. Section 1601, et seq., the Plaintiffs-Appellants seek reversal of an order of the United States District Court of the District of New Mexico. The cause was disposed of on summary judgment.

Each of the Plaintiffs-Appellants is a person who purchased a used motor vehicle from the Defendant Reynolds on an installment payment basis. The prayer in each case is for statutory damages, reasonable attorney's fees and costs, and is based on alleged violations by Reynolds, d/b/a Ben's Auto Sales, in Gallup, New Mexico. The claim is that Reynolds violated the Truth-in-Lending Act and Federal Reserve Regulation Z, 12 C.F.R. Section 226.1. The crux of the claim is that Reynolds failed to disclose a finance charge and to express it as an annual percentage

rate when, in fact, the allegation is, a finance charge was imposed on credit customers. It is further alleged that Reynolds used language which contradicted and obscured the information required by the Truth-in-Lending Act, 15 U.S.C. Section 1601 et seq., and Regulation Z, 12 C.F.R. Section 226.6(c).

There is no dispute about the facts:

Reynolds, who does business in Gallup, New Mexico, as Ben's Auto Sales, was engaged in retail sale of used cars. 98% of his sales were pursuant to installment contracts which provided for four or more payments payable on a prearranged schedule. The same printed-form contract was used in all of his sales transactions. Included in each contract was the following statement:

> "Buyer. . . having been quoted both a time sale price and a lesser cash price hereby purchased from Seller on a time price basis. . . . the following property. . ."

The actual transaction was different from this description. At no time did Reynolds quote to the Plaintiffs-Purchasers two different prices. In fact, the prices quoted as the "cash price" and the "deferred payment price" in the contracts were the same. Reynolds did not quote or charge any of his customers different prices according to the payment terms. Each of the present contracts disclosed the finance charge and the annual percentage rate as zero.

Thus, an express statement regarding interest or financing charge was studiously avoided. The practice was that the price was the same regardless of whether the buyer agreed to pay cash or to pay for the car in installments. Furthermore, Reynolds, according to the stipulated facts, did not sell the contracts at a discount to any other individual or financing institution. There were, nevertheless, expenses in collecting delinquent payments and repossessing automobiles.

According to the evidence, this service was performed by Reynolds' salesmen. They were given notice at the outset of their employment that they would be, from time to time, required to make collections or repossessions and they did so. Reynolds would sometimes furnish an automobile for the purpose of performing this service. The salesmen would make the collections and sometimes would repossess the vehicle by connecting it to the salesman's car through the use of a towing bar.

The trial court ruled that there had been a failure to prove that Reynolds' automobiles were artificially priced so as to hide finance charges, or that there were any real differences between the cash price and the deferred payment price. The court found also that the evidence failed to establish the existence of hidden finance charges and that the contract language was not confusing. Each of the transactions was negotiated face-to-face by the Plaintiffs

with the salesmen, and the agreed price was in accordance with an oral agreement. The trial court determined that costs incurred by Reynolds for extension of credit were part of his regular business expenses; that these are not in any way reflected in the price which he charged installment customers.

The important issue in the case is whether this single-price sales approach was intended to and did conceal the cost of credit so as to circumvent the Truth-in-Lending Act, 15 U.S.C. Section 1601, et seq. and 12 C.F.R. Section 226.4.

The suit is on behalf of five Plaintiffs, Ella Yazzie, Albert Sliver, Mary Keyonnie, Alice Mary Begay and Adella T. Benally. The several cases do not differ one from the other on facts or issues. The same printed-form contract was used in each sale to the several Plaintiffs. Each contract contained the following statement:

> "Buyer. . .having been quoted both a time sale price and a lesser cash price hereby purchased from Seller on a time price basis. . .the following property. . ."

Contrary to this language, the contract provided under the heading of "Finance Charge" and "Annual Percentage Rate" a zero. Also, each contract contained a space labeled "cash price" and another space stating "Deferred Payment Price." On each contract the Appellee disclosed the "Deferred Payment Price" as an amount equal to the "Cash Price."

A flat fee was paid to the collector (salesman) for each credit payment which he successfully collected. On some occasions Reynolds would employ persons other than the salesmen to make the collections. Here again, a flat fee for each delinquent payment collected was given. There were also expenses from use of an automobile in bringing about the collection.

More than 50% of Ben's Auto Sales' customers were residents of the Navajo Indian Reservation. The vehicle of Albert Slivers which was repossessed at Ganado, Arizona, was located some 40 miles from the used car lot. An attempt was made to repossess the

vehicle of Alice Mary Begay from Window Rock, Arizona. This was 26 miles from Reynolds' place of business. Appellant Mary Keyonnie ceased payment to Ben's Auto Sales on her vehicle after it was wrecked in an accident. Reynolds abandoned this car due to its condition and because of storage charges.

When he repossessed a vehicle, Reynolds would send a form letter to the delinquent credit buyer informing him or her of the repossession and of the amount required to reclaim the vehicle. The period during which Plaintiffs' purchases were made, Ben's Auto Sales lost money as a result of amounts unpaid by credit buyers.

APPENDIX 8

The various sections of the Truth-in-Lending Act require the amount of the finance charge "imposed directly or indirectly by the creditor as an incident to the extension of credit" to be determined by including any of the following:

1) Interest, time price differential, and any amount payable under a point, discount, or other system of additional charges.

2) Service or carrying charge.

3) Loan fee, finder's fee, or similar charge.

4) Fee for an investigation or credit report.

5) Premium or other charge for any guarantee or insurance protecting the creditor against the obligor's default or other credit loss.

15 U.S.C. Section 1605(a)

Regulation Z defines the items which are set forth in Section 1605 in somewhat greater detail. Thus, Regulation Z, for all practical purposes, follows the more general provisions contained in the statute. Both the statutory provision and the regulation reveal the purpose of the statute, which is identification and

disclosure of the charges associated with financing the transaction.

Plaintiffs contend:

1) That a finance charge under the statute is imposed on credit buyers where creditor has an insignificant percentage of cash sales and incurs substantial costs in connection with the extension of credit.

2) That the trial court failed to give effect to the inferences as to finance charges which are to be drawn from the basic facts.

3) That the language of the contract contradicts the disclosures required by the Truth-in-Lending Act, 15 U.S.C. Section 1601 et seq., and violates Regulation Z, 12 C.F.R. Section 226.6(c).

4) That actual damages need not be proven in order for a buyer to recover.

Finance charges within the meaning of the Act are, as we have noted above, all charges payable by the person to whom the credit is extended, and charges "imposed

directly or indirectly by the creditor as an incident to the extension of credit. . ." Section 1605, supra. The obvious object is to prevent hidden, undisclosed costs whereby the credit buyer is unable to know the identity of the credit items. If any such finance items were added to the cost of the automobile and charged the buyer, it is essential that they be disclosed to the buyer in order that he or she can make informed decisions. In other words, the Defendant was required to disclose any sums of money which stemmed from the credit transaction. The automobiles which were sold were not expensive, but the number of payments were in excess of four. The same pattern was present in every instance. Also, the evidence established that 98% of the sales made by the Defendant provided for payment in more than four installments, and that there were necessarily costs which grew out of this way of doing business. Books had to be kept on the status of each

sale, receipts had to be given when payments were made, and fees paid for collection of delinquent payments in nearly all of the instances in which there was a time contract. Defendant had a vehicle used for collections and repossessions with a tow bar. Furthermore, he suffered losses on account of unpaid and uncollected bills. The cash customers were charged the same amount as the credit customers but credit customers necessarily required added expenditure, particularly those customers that required trips to relatively distant towns for the purpose of making the collection or repossessing the vehicle. It is not difficult to infer from the record before us that the purchase price to the credit customer, at least some part of it, was used to defray the costs of collection or repossession, or both.

Kriger v. European Health Spa, Inc., of Milwaukee, Wis., 363 F. Supp. 334 (E.D.Wis. 1973), is not dissimilar from the instant case. It was a Truth-in-Lending case which

involved the cash price of membership in a health spa, but here the notes given were discounted by a bank which paid the balance to the spa. The difference between the note and the note as discounted was held to be a finance charge. The court held that the discounted amount was a credit charge to finance the transaction solely for the extension of credit, and that the Defendants' argument that there was not a "finance charge" for the reason that all parties agree that the notes were for a "unitary price," regardless of whether a membership purchaser paid a lump sum or executed a promissory note or installment contract was unconvincing. The court cited Strompolos v. Premium Readers Service, 326 F. Supp. 1100, 1103 (N.D.Ill. 1971), Joseph v. Norman's Health Club, Inc., 336 F. Supp. 307 (E.D.Mo. 1971), and Garza v. Chicago Health Clubs, Inc., 347 F. Supp. 955, 964 (N.D.Ill. 1972). The court concluded

that the unitary price which was adopted by the European Health Spa "served no function other than that of concealing the real cost of credit." 363 F. Supp. at 337. The cash price was nothing more than theoretical. The fact that only 35 out of 1775 customers during the time in question paid cash provided cogent support for the belief that the Defendants did not expect to sell their services on that basis and that the "unitary price" was but a marketing tool designed to convince the customer that he was getting a free extension of credit.

Also discussed in the Kriger opinion is the decision of the Supreme Court in Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973). The basic issue in that case was whether or not the Federal Reserve Board had exceeded its authority in promulgating Regulation Z and, especially, the "four-installment rule." The Respondent's door-to-door salesmen had called on a poor widow residing in Florida, and sold her a

five-year subscription to four magazines. She agreed to pay $3.95 immediately and to remit a similar amount monthly for 30 months. There was a clause in the contract stating that the subscriptions could not be cancelled and an acceleration provision providing that any default in installment payments would render the balance due immediately. The total purchase price was not stated nor did the contract state the amount remaining unpaid after the initial payment. Also, there was no mention made of the service or finance charge. The Petitioner made the initial payment, but soon thereafter defaulted, whereupon Respondent declared the entire balance due and threatened to bring an action. Subsequently, a suit was indeed started in the United States District Court. It was alleged in the action that the Respondent had failed to comply with the disclosure provisions of the Truth-in-Lending Act. Recovery of the statutory penalty plus costs, including attorney's fees, was sought.

In Mourning, the price was the same whether it was remitted in cash or in payments. The evidence, however, showed that in some cases customers agreed to pay the entire contract price at a price less than the aggregate amount of the installments. The District Court granted relief, giving the Petitioner (Plaintiff) a summary judgment. The Court of Appeals reversed, saying that the Federal Reserve Board had "exceeded its statutory authority in promulgating the regulation upon which the District Court relied," because that regulation was in conflict with Section 121 of the Act in that it required disclosure in regard to credit transactions in which a finance charge had not been imposed. In the course of the opinion by the Chief Justice, it was pointed out that the ultimate purpose of Congress in enacting the Truth-in-Lending Act was to give to the consumer information whereby he or she could compare the cost of credit and made an informed judgment as to the use of the credit. In other words, it

was an effort to bring about an informed use of credit. The Court recognized that credit occurred in myriad forms, and for that reason the structure of the Act was broadly laid; that the language was such as to evidence an awareness by Congress that some creditors would attempt to characterize their transactions so as to fall one step outside whatever boundary Congress attempted to establish. The Act also indicated "the clear desire of Congress to insure that the Board had adequate power to deal with such attempted evasion. In addition to granting to the Board the authority normally given to administrative agencies to promulgate regulations designed to 'carry out the purposes' of the Act, Congress specifically provided, as noted earlier, that the regulations may define classifications and exceptions to insure compliance with the Act." 411 U.S. at 365. The Court said that one means of avoiding the objectives of the Act as passed by Congress was to bury the cost of the credit

in the cost of goods sold. "Thus in many credit transactions in which creditors claimed that no finance charge had been imposed, the creditor merely assumed the cost of extending credit as an expense of doing business, to be recouped as part of the price charged in the transaction." 411 U.S. at 366. The Court said that Congress was fully aware of the practices and devices used to evade the disclosure requirements of the Act. The Supreme Court went on to hold that the four-installment rule was well within the purpose that Congress had in preventing avoidance of the Act.

A partial dissent by Justice Douglas, concurred in by Justices Stewart and Rehnquist, concluded that the case was not one for summary judgment and that the District Court erred in granting the summary judgment to the Plaintiff-Petitioner. The judgment was reversed and it was remanded with directions to vacate the summary judgment

that had been entered even in the absence of imposing evidence. About all that was cited as evidence that a credit transaction existed was the fact that the Respondent had sent Petitioner Mourning a letter reminding her that the seller had ordered the magazine in advance and the buyer had incurred an obligation to pay and that "this is a credit account and as such must be repaid by you on a monthly basis." The opinion of Justice Douglas stated that this was not a conclusive admission and that was why it could not be determined on summary judgment.

For the purpose of this case, the Mourning decision operates to bring the claims of the several Plaintiffs as against the Defendant within the provisions of the Act in that the Supreme Court approved the four-installment test or standard. It also recognized the broad purposes that Congress was seeking to achieve in requiring the disclosure of the various aspects of credit transactions which require disclosure. In

the light of the Act, a single price for both cash and credit transactions, notwithstanding that the vast portion of the business of the Defendant-Appellee involved installment payments which are costly, tends to show that the Defendant is seeking to avoid the requirements of the Truth-in-Lending Act. In other words, the evidence in the case raises at least a factual issue as to whether these transactions are a ploy which has been designed to avoid the Truth-in-Lending Act.

Notwithstanding the above comments, our present holding is limited to the legal effect of the Court's summary judgment ruling in favor of the Defendant. We are of the opinion that the record did not justify the trial court's conclusion that the Defendant was entitled to summary judgment against these Plaintiffs. The conclusion that there are no questions of fact and that the questions of law favor the Defendant disregards the objects and purposes of the Act and the particular facts which have been set forth and recounted above. There are basic facts which give rise to inferences that the contracts in issue seek to disguise the real nature of the contracts as being credit transactions which seek to avoid the intricacies of the Truth-in-Lending Act. Moreover, there are facts which establish that substantial expenditures were made in servicing the installment contracts. These expenditures were, of course not revealed and the trial judge should consider the questions which are thereby raised.

The Defendant argues that he lost money on these installment contracts. It may be that he went to so much trouble in his efforts to avoid the Act that he did not get compensated for legitimate demands. The fact, however, that he made money or lost money is not the question before us. The issue is whether he violated the Truth-in-Lending Act by concealment of the facts.

These, then, are the issues with which the Trial Court must come to grips in reassessing the case.

The judgment of the District Court must, then, be reversed and the cause must be remanded for further proceedings consistent with the expressions contained herein.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

No. 77-582-M Civil

ELLA YAZZIE, et al.,

Plaintiffs,

-vs-

GERALD REYNOLDS, d/b/a
BEN'S AUTO SALES,

Defendants.

E. L. Mechem
United States District Judge

(Filed October 11, 1978)

MEMORANDUM OPINION
AND ORDER

This case comes up on cross motions for summary judgment. The Plaintiffs claim violations of the Truth-in-Lending Act (TIL), 15 U.S.C. 1601 et seq., alleging that the Defendant, when making credit sales of used automobiles, used an agreement form that (1) failed to disclose a "finance charge" and an "annual percentage rate," and (2) provided additional information that was misleading and confusing to the buyer.

The parties have stipulated to the essential facts. Briefly, the Defendant does business as Ben's Auto Sales in Gallup, New Mexico, and is engaged in the retail sale of used automobiles. Ninety-eight percent (98%) of the Defendant's sales have been pursuant to installment contracts of four or more payments payable on a prearranged schedule. All of the contracts were supplied by the Defendant and each contained an initial statement that the buyer had been quoted "both a time sale price and a lesser cash price" and had

chosen to purchase on a time price basis. Each contract disclosed a Deferred Payment Price identical to the Cash Price given. Each contract disclosed the finance charge and the annual percentage rate as zero. The Defendant is a creditor for purposes of 15 U.S.C. 1602(f). The credit extended is consumer credit and all of the Plaintiffs are customers as those terms are defined in 12 C.F.R. 226.2.

The Defendant contends that he marketed automobiles on a single price basis, that he has never charged for an extension of credit, and that he has fully complied with TIL requirements. The facts not in dispute, the question presented is whether the Defendant's single price sales transactions are intended to bury the cost of credit and circumvent TIL regulations.

Mourning v. Family Publications Service, Inc., 411 U.S. 356, 377 (1973), stated:

> "The Truth-in-Lending Act reflects a transition in congressional policy from a philosophy of "Let the buyer beware" to one of "Let the seller disclose." By erecting a barrier between the seller and the prospective purchaser in the form of hard facts, Congress expressly sought "to. . . avoid the uninformed use of credit." 15 U.S.C. 1601.

Few cases exist helpful on the point here at issue. The several District Courts and the few Appellate Courts considering the same or related questions agree that the Act is broad and remedial and that "the substance of the transactions is the controlling factor." Joseph v. Norman's Health Club, Inc., 532 F.2d 86, 93 (8th C. 1976).

The Plaintiffs contend that looking at the substance of the transactions in this case necessitates a conclusion of hidden finance charges. Plaintiffs argue that by reason of the costs of carrying large numbers of installment contracts, costs of collections, repossessions and record keeping, and by reason of the small percentage of cash customers the Defendant

must be passing to the credit customers, without disclosure, his costs of extending credit. The Plaintiffs rely on the Defendant's own contractual language that the buyer "purchases from the seller on a time price basis" and on cases holding that "burying" the cost of credit by single price sales is a violation of the Act.

In Kriger v. European Health Spa, Inc., 363 F. Supp. 334 (D.C.E.D. Wisc. 1973), the Defendant Spa charged customers a set fee to be paid in installments on a prearranged schedule. On the contracts, the Spa listed "none for "finance charge" and "0" for annual percentage rate." The Spa sold 1540 of 1740 of these retail contracts to Defendant First Wisconsin National Bank at a 16% discount rate. For this reason, the Court held that the cash price was "theoretical," "a marketing tool designed to convince the customer that he was getting a free extension of credit." Id. at 337. The Defendant Spa was found to have violated

the Truth-in-Lending Act. The disclosures were held to be in error and the Spa was found to be a conduit for the regular extension of credit by the bank.

> "Correct disclosures would have reflected as a "finance charge" to the Plaintiffs the amount of the discount obtaining (sic) in the arrangement between the Defendant's Spa and First Wisconsin. In addition, the "cash price" disclosed should have been the discounted amount received by Spa from First Wisconsin upon the assignment of the Plaintiff's notes. Id. at 335.

In the instant case, unlike in Kriger, there is no indication that the Defendant ever sold or discounted his contracts. There is no proof that more than one price was quoted a customer depending on whether he intended to pay cash in full or to defer payment. There is no proof that Defendant's automobiles were artificially priced or that a real difference existed between the cash price and the deferred payment price. The Plaintiffs insist that because the

Defendant incurred added expenses by virtue of his deferral of payments he necessarily imposed a finance charge on those transactions in which payment was deferred. Businessmen do pass on costs of doing business to their customers, but this does not establish a violation of TIL.

Plaintiffs' brief in support of the motion for partial summary judgment states that "If Plaintiffs demonstrate through uncontroverted facts that the amount of the finance charge imposed by Defendant could not have been zero, they are entitled to judgment as to liability as a matter of law." Plaintiffs have shown that the cost of extending credit could not have been zero, but have not proven that these expenses were "charges imposed" by the Defendant on his credit customers. The quoted contract language is insufficient to establish this essential part of the Plaintiffs' case; ". . .'costs incurred' and 'charges imposed,'. . .simply cannot

reasonably be presumed synonymous as Plaintiffs would have it." Manzina v. Publishers Guild, Inc., 386 F. Supp. 241 (D.C.S.D.N.Y. 1974).

In Manzina, supra, Defendant was charged with a TIL violation by incorrectly representing that no finance charges had been included in the price of its installment sales contracts. The Defendant had three ways for buyers to purchase its publications: cash, short term contracts, and long term contracts. Only with the third option did the Defendant disclose added charges as required by TIL. Plaintiff Manzina purchased from Defendant under the short term contract and claimed that a percentage of the price of that contract and those like it represented a hidden finance charge imposed without required disclosures. The short term contracts were never assigned, sold or discounted by the Defendant. The Plaintiffs' contention was, as here, that the Defendant necessarily incurred costs

in extending credit and converted those costs into a finance charge.

The Court dismissed the Plaintiff's action in Manzina holding that the cost of extending credit was "but one" of the Defendant's costs of doing business, was not reasonably ascertainable, and had not been shown to be a part of the deferred payment price.

> "Plaintiffs have not demonstrated, and indeed this Court is persuaded that they cannot demonstrate, that the price is fictitious, or that there is a difference between the cash price charged when payment is made in full at the time of subscription, and the deferred payment price under the "no finance charge/ no credit service charge" contract. Id. at 243, 244.

I am confronted with the same situation in the present action. If there is no difference in the price charged when the customer pays cash or when the customer defers payment, there is no hidden finance charge in the sale. The only indication in the record that the Defendant used two prices is the language quoted at the beginning of the contract

referring to a time price basis. In the absence of any other evidence this is not enough.

The Plaintiff did not sign these contracts in a closet. Each Plaintiff had face to face contact and discussion with the Defendant or his salesman. I am not convinced that the language about which Plaintiffs complain is either misleading or confusing. I cannot find the Defendant liable on the basis of what is contained in a contract form disregarding what actually took place between the parties. Plaintiffs and the Defendant negotiated a price. Plaintiffs have not proved this price to be different in the instances where payment was to be deferred and the instances where payment was to be cash in full.

I cannot conclude that the Defendant has imposed upon the Plaintiffs a "finance charge." Strompolos v. Premium Readers Service, 326 F. Supp. 1100 (D.C.N.D.Ill. 1971), dealt with single price sales of

magazine subscriptions and in speaking of hidden charges warned that the Courts should recognize evasions of the Truth-in-Lending Act and not be "simplistic" in its belief that the costs of extending long term credit are absorbed by the seller. I cannot, however, assume; I must require that Plaintiffs prove their case. In this instance I find that the costs of extending credit are only a part of the Defendant's regular business expenses, that the Plaintiffs have not demonstrated that all or part of these expenses are incorporated in the price charged credit customers, that the Plaintiffs have not proven a differential between the cash price and the deferred price.

The facts are uncontroverted, but they fail to prove that the Defendant's statements of zero as to "finance charge" and as to "annual percentage rate" are false and that the contract reference to "time sale price" is misleading or confusing. I conclude that the Defendant

is entitled to judgment as a matter of law. Now, Therefore,

IT IS ORDERED that the Plaintiffs' Motion for Partial summary judgment is hereby denied; and

IT IS FURTHER ORDERED that the Defendant's Motion for Summary Judgment is hereby granted.

/s/ E. L. Mechem
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 78-2012

ELLA YAZZIE, ALBERT SLIVERS, MARY KEONNIE, ALICE MARY BEGAY and ADELLA T. BENALLY,

Plaintiffs-Appellants,

vs.

GERALD REYNOLDS, d/b/a Ben's Auto Sales,

Defendant-Appellee.

May Term - June 12, 1980

Before Honorable Oliver Seth
Chief Judge
Before Honorable Jean S. Breitenstein
Circuit Judge
Before Honorable William E. Doyle
Circuit Judge

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of New Mexico, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that Court is reversed. The cause is remanded to the United States District Court for the District of New Mexico for further proceedings consistent with the expressions contained in the Court's opinion.

HOWARD K. PHILLIPS
Clerk